#176

THE ONTARIO HUMAN RIGHTS CODE

R.S.O. 1970, c. 318 as amended

In the matter of the complaint made by Ms. Susan Ballantyne of Toronto, Ontario, alleging discrimination in employment by Molly 'N' Me Tavern, 1215 Bloor Street West, Toronto, Ontario

A Hearing before Professor John D. McCamus, appointed a Board of Inquiry into the above matter by the Minister of Labour, The Hon. Robert Elgie, to hear and decide the above-mentioned complaint.

Appearances: Ms. J. Minor, Counsel for the Ontario Human Rights Commission

Ms. B. Symes, Counsel for the Complainant

Mr. P.E. Harvey, Counsel for the Respondent

I

This complaint arises from an incident involving an application made by the complainant, Susan Ballantyne, for employment as a waitress with the respondent, Molly 'N' Me Tavern. The complainant and the Commission allege, in essence, that the complainant was not hired because she refused to comply with a condition of employment which was discriminatory in nature in the sense that it imposed more burdensome obligations on female members of the serving staff than were to be imposed on male members of the staff engaged in the same work.

It is argued on behalf of the complainant and the Commission that a refusal to hire in such circumstances contravenes sub-paragraphs (1) (a), (e) and (g) of Section 4 of The Ontario Human Rights Code. Those provisions state the following:

> IV (1) No person shall,
>
> (a) refuse to refer or to recruit any person for employment;
>
> ...
>
> (e) establish or maintain any employment classification or category that by its description or operation excludes any person from employment or continued employment;
>
> ...
>
> (g) discriminate against any employee with regard to any term or condition of employment,
>
> because of race, creed, colour, age, sex, marital status, nationality, ancestry, or place or origin of such person or employee.

The complainant and the Commission argue that the imposition

of a discriminatory condition is, in a sense, a constructive refusal to recruit and therefore within the scope of Section 4 (1) (a). With respect to Section 4 (1) (e), it is argued that the imposition of a discriminatory condition establishes an employment classification that excludes a person from employment inasmuch as it is a condition which the employer cannot reasonably expect individuals to meet. With respect to Section 4 (1) (g), it is argued that the coverage of this sub-section would extend to a case where the discriminatory condition was to be imposed on a potential recruit for a position and one who is therefore not yet an "employee".

The position taken by the respondent is that the alleged facts which give rise to this complaint are simply not true. In particular, Mr. Albert Nightingale, a co-owner of the respondent tavern, has testified that the incident in question simply did not occur in the manner set forth in evidence by the complainant Ballantyne. The respondent has argued in the alternative that even if one accepts that the incident in question occurred in the manner indicated by the complainant, the alleged conduct of Mr. Nightingale would not infringe the Code on either one of two grounds. First, it is suggested that the interpretations of Section 4 offered on behalf of the complainant and the Commission are not valid. Second, it is argued that the alleged conduct did not constitute the attachment of a discriminatory condition to a job held by both males and females but rather, created a new job available to female applicants only. Finally, the respondent has argued that the Appointment establishing the present Board of Enquiry is a nullity on the ground that the

respondent specifically named in the Appointment is not a legal person for the purposes of proceedings under The Ontario Human Rights Code.

As the evidence concerning the incident in question in this matter is in direct conflict, it is necessary for this Board of Inquiry to determine which of the accounts given appears to be more reliable. As will be seen, I have come to the conclusion that the evidence led on behalf of the complainant and the Commission is to be preferred. In the next section of this decision, an account of the facts as I find them to be will be given, and in the following section, a brief account of the reasons for preferring the evidence led on behalf of the complainant and the Commission will be set forth. In subsequent sections of the decision, the applicable law will be set out and applied to the facts of this case. Finally, the merits of the respondent's contention concerning the validity of the original Appointment will be considered.

II

The respondent tavern was, at all material times, a union tavern in the sense that its employment relationship with its serving staff was governed by a collective agreement. The agreement in question had been entered into on behalf of the respondent by The Hotel Association of Metropolitan Toronto with Local 280 of The International Beverage Dispensers' & Bartenders' Union of The Hotel and Restaurant Toronto Employees' & Bartenders' International Union, A.F. of L., C.I.O., C.L.C. (the "Union") on June 30, 1977. The Agreement sets forth the terms and conditions of

employment for employees engaged in various tasks such as bartending and waiting on tables in taverns covered by the Agreement. Under Article 4.07 of the Agreement, an obligation is imposed on employers to notify the Union with respect to any available jobs. If the Union office is unable to supply satisfactory applicants to fill a position within 24 hours, the employer may then hire outside the Union membership. This requirement extends to new categories of employment established by the employer to carry out work of the kind covered by the Agreement.

It will be useful to note that in any situation where an employer wished to establish a new job classification, a required method of doing so necessitating consultation with the Union is set forth in Article 16 of the Agreement. If the Union and the employer are unable to agree to the terms and conditions of the new category of employment, the matter can be referred to an arbitrator under Article 16.02.

The evidence relating to the incident giving rise to the present complaint indicates that on April 26, 1978, a telephone call was placed by Mr. Nightingale to the Union office in which he indicated that there was an opening at the respondent tavern for a waitress. Mrs. Betty Moore, who took the call, has testified that Mr. Nightingale specified that he wanted a "topless" waitress. Although Mr. Nightingale conceded in evidence that he had placed an order for a waitress at that time, he has protested that he did not stipulate that the waitress be "topless". Indeed, Mr. Nightingale testified that he asked for either a waiter or a waitress at that time.

It should be noted that it is common ground between the parties that at this time both male and female persons were included in the serving staff employed by the respondent tavern and they were doing the same job of waiting on tables. Further, it is common ground that the existing staff as of April 26, 1978, worked fully clad. There was, however, a suggestion in the evidence of Mr. Grima, a member of the Commission's staff who investigated the ultimate complaint, that topless waitresses had been employed on previous occasions. This was flatly denied by the respondent's witnesses and the existence of a previous practice of hiring topless waitresses has not, in my view, been established on the evidence before this Board.

Mrs. Moore testified that it was not Union practice to supply topless waitresses and it was her view that Mr. Nightingale was aware of this fact. In any event, having received the telephone call, she discussed the request with Mr. Troll, then the Secretary-Treasurer and Business Agent of the Union. Ultimately, it was decided that the request should be recorded in the log book in which orders of this kind were noted (Exhibits 2 and 2a), without any indication of Mr. Nightingale's request for a waitress who would work topless. The entries for April 26 indicate an order placed for both a waiter and a waitress, it being indicated by Mrs. Moore that although it was the practice of the Union to record whether a tavern requested a waiter as opposed to a waitress, both male and female applicants would be sent to apply for such positions. In the instant case, Mrs. Moore indicated to the complainant Ballantyne and to at least two possible male candidates that a position was available

at the respondent tavern.

At least two of the individuals so informed by Mrs. Moore, Ms. Ballantyne and Mr. Anthony Upper, proceeded to the premises of the respondent tavern in order to apply for the job. Neither Ms. Ballantyne nor Mr. Upper had been informed by Mrs. Moore that Mr. Nightingale had requested a "topless waitress". Ms. Ballantyne, whose evidence on this question I accept, described the ensuing encounter with Mr. Nightingale in the following terms: (Transcript, pp. 22-24)

Q. Alright. Did you have a discussion with him?

A. Yes I did. I walked up and introduced myself and said that I was from the Union office. I'd heard that they had needed help, and then I went into a little speech about all the experience that I had.

Q. Alright. What happened then.

A. And then he looked at me for about - he interrupted me in the middle of a speech - and he said, 'Alright then, come into my office and take off your shirt and let me see what you've got.'

....

Q. What did you reply?

A. I think I just said, 'What? What?' I was really surprised. I said 'What do you mean?'
And he said 'Well, the job is topless.'
And I said that I didn't know that.

Q. Alright.

A. And then I said, I looked around and there was a male waiter who was serving draft about maybe twenty feet (20') away, and I said 'He's not working like this - he's not working topless. How come I have to work topless?'

Q. And what was the response?

A. He just said, 'Well, we're starting a new policy', I think were his words, or something to that effect. 'We're just hiring topless'.

Q. And what happened then.

A. Well I was very upset and very angry. I think I might have said something else about 'This isn't fair', or 'It's not right', 'You can't do this' - 'Isn't it enough that I can just - you know, that I have almost five (5) years' experience.'

Q. Can you speak up a little?

A. 'Isn't it enough that I have almost five (5) years' experience. What do you want. If you want a waitress, here I am.'

And he just - I think he shrugged and said, 'Well, I want topless waitresses.'

Q. Uh huhm.

A. So I left.

Mr. Upper testified that his visit to the respondent tavern was also unsuccessful. Having indicated to Mr. Nightingale and to a person who identified himself as the Manager that he wished to apply for the available position, he was advised by the Manager that they were hiring topless waitresses only. (Transcript, p. 729)

As has been indicated, Mr. Nightingale has denied in evidence that the encounter transpired in this fashion. It was his recollection that in response to an enquiry from Ms. Ballantyne he said that he was hiring topless dancers and waitresses and that Ms. Ballantyne, without further comment, turned on her heel and left the premises. It was in fact the practice of the tavern at that time to employ topless dancers as entertainment, and thus Mr. Nightingale's explanation for the incident is that there must have been some sort of misunderstanding on Ms. Ballantyne's part of his response.

There is no contest between the parties with respect to Ms. Ballantyne's suitability as a recruitment candidate for a waitress job. I am satisfied, therefore, that were it not for the problem concerning the unusual working conditions, Ms. Ballantyne would have

been offered the waitress job. I am also confident that she would have accepted it. Ms. Ballantyne was actively seeking employment at that time and ultimately did obtain employment at another tavern approximately two weeks after this incident.

Finally, I should note that there is no convincing evidence that topless waitresses as such were employed by the respondent in the spring of 1978. In April of 1979, however, a practice was adopted for a while of encouraging topless dancers to wait on tables after completion of their performances. When waiting on tables, the dancers were required to wear a "top" of their own choice, as Mrs. Nightingale testified, "for health reasons". It was conceded that there had been some discussion between Mrs. Nightingale and a member of the tavern staff, in early 1978, with respect to the possible use of topless dancer-waitresses, but the scheme did not come to fruition until 1979.

It should further be noted that in Mrs. Nightingale's view, the term "topless" would include individuals who are "scantily clad" and that as far as her use of the term was concerned at least, it would not necessarily involve absolute nudity above the waist. Even if one accepts the possibility that the term might have the extended use contended for, however, it is my view that this is not of assistance to the respondent. It is evident that what would be contemplated would be the wearing of very revealing outfits which would engage a similar legal analysis. Moreover, whatever private meaning either Mrs. Nightingale or Mr. Nightingale might have had for the term "topless", it is my view that they must be held to the ordinary implication of that term, i.e. an individual nude from the waist up, in the absence of any evidence that a private

or special meaning to the term was communicated either to the Union or to Ms. Ballantyne.

IV

The presence of a direct conflict in the testimony of the complainant and Mr. Nightingale with respect to the incident in question necessitates a decision to prefer the evidence of one witness over that of the other. The decision of this Board to prefer the evidence of the complainant is based on the following considerations.

The account of the incident offered by the complainant is consistent with that of a number of other witnesses whose testimony I found convincing. Mrs. Moore, who received the telephone call from Mr. Nightingale on April 26, 1978, clearly understood Mr. Nightingale to be placing an order for a "topless waitress". Mrs. Moore indicated that she received a telephone call from Mr. Nightingale the day after Ms. Ballantyne visited the premises of the respondent tavern, complaining that Ms. Ballantyne should have been informed that a request had been made for a waitress who would work "topless". Mr. Troll indicated that he had a conversation with Mr. Nightingale in April of 1978 in which the latter indicated that he had placed an order for topless waitresses and was mystified as to why it was the Union was sending him waiters to apply for the position. The evidence of Mr. Upper, to the effect that when he applied for the position in question and was informed that the respondent was interested only in topless waitresses, is also consistent with the version of the incident put forth by the complainant.

Against this background, the suggestion made by Mr. Nightingale that he had indicated to the complainant that he was interested in hiring "topless dancers and waitresses" and that he did not mean by this that the waitresses would also work topless, is not convincing. The collective agreement does not, on its own terms, cover entertainers and therefore it seems unlikely that Mr. Nightingale would have sought to place an order for a topless dancer with the Union. The respondent tavern had been in the practice of hiring topless dancers from another source, and there is nothing in the evidence of either Mr. or Mrs. Nightingale to suggest that either one of them thought that the Union could provide topless dancers. It seems very likely, therefore, that Mrs. Moore and Mr. Troll correctly understood the order being placed with the Union as one for topless waitresses, and that Ms. Ballantyne was considered by Mr. Nightingale to be an applicant for a job of this kind.

The evidence of Mr. Grima, the Human Rights Officer who investigated this complaint, is also consistent with that of the complainant. The conversations Mr. Grima had with Mr. & Mrs. Nightingale and Mr. Bonner, the Manager of the tavern at the material time, confirmed that the respondent was interested in hiring topless waitresses and that the complainant was refused a job because she refused to work in this capacity.

The only evidence offering direct corroborative support of Mr. Nightingale's account of the incident was that of Mr. Rosenberg, a regular patron of the respondent tavern, who testified as to his belief that he had been present at the incident in question and confirmed that a conversation more or less similar to that described

by Mr. Nightingale had occurred. There were, however, difficulties with Mr. Rosenberg's evidence. On matters of fact with which both Mr. Nightingale and Ms. Ballantyne appeared to be in agreement, for example the location within the tavern in which the incident occurred, Mr. Rosenberg's evidence is inconsistent. Moreover, Mr. Rosenberg testified that he could not identify the complainant and did not recall with precision the day or week when the incident he recalled had occurred. If Mr. Rosenberg's evidence is to be accepted as sincere, it would appear that he must have been present at an incident other than the one involving Ms. Ballantyne.

Much evidence was led before this Board to indicate that this tavern was in some financial difficulty during the period prior to April of 1978 and further, that there was no turnover of either male or female staff for a significant period of time before and after that date. Although not of much significance in light of the foregoing, it is at least the case that this evidence is consistent with the suggestion that Mr. Nightingale was considering a new initiative in the form of hiring topless waitresses to attempt to deal with a problem of declining patronage.

The foregoing, together with the fact that Mr. Nightingale in his own evidence appeared to have some difficulty recalling and/or explaining matters pertinent to the incident complained of, has led me to the conclusion that the evidence of the complainant is more reliable than that of Mr. Nightingale and must be given preference in areas of conflict.

V

One plausible view of this case is that it represents a situation in which an employer has imposed or sought to impose a discriminatory work condition on female employees occupying a position for which both male and female candidates are hired. Thus, it could be argued that the waiter or waitress job is effectively one position. The employer hires both male waiters and female waitresses and pays them the same wage for doing the same kind of work. In April of 1978, a decision was taken to impose a very onerous condition on new female employees holding this position and this could be argued to constitute discrimination within the meaning of Section 4 (1) (e) and (g).

Although there do not appear to be previous cases decided under The Ontario Human Rights Code dealing with discriminatory dress codes, there are a number of American authorities and a recent decision of a Board of Inquiry in New Brunswick under analagous legislation holding that the imposition of a more burdensome requirement relating to dress or appearance on employees of one gender constitutes an unlawful act of discrimination. For example, in Carroll v. Talman Federal Savings and Loan Association, 604 F. 2d 1028 (Seventh Cir. 1979), cert denied, 100 S.Ct. 1316 (1980), a dress code imposed on female office employees of a savings and loan association was held to be discriminatory. The Association's dress policy required all of its female tellers, office and managerial employees to wear a uniform, whereas male employees who occupied the same positions were required only to wear customary business attire. The Court noted its general reluctance to pass judgment on whether a particular

appearance regulation is reasonable, provided that the regulation finds "some justification in commonly-accepted social norms" and is "reasonably related to the employer's business needs" (p. 1032). The Court went on to state (at pp. 1032-1033):

> However, the situation is different where, as here, two sets of employees performing the same functions are subjected on the basis of sex to two entirely different dress codes - one including a variety of normal business attire and the other requiring a clearly identifiable uniform. This different treatment in the conditions of employment for female employees cannot be justified by business necessity, since, as already described, the employer has a variety of non-discriminatory alternative means of assuring good grooming. Moreover, the disparate treatment is demeaning to women. While there is nothing offensive about uniforms per se, when some employees are uniformed and others not there is a natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues attired in normal business clothes.

On one view, then, the facts of the present case represent simply a startling illustration of the phenomenon considered in the Carroll case. If this is indeed the proper characterisation of the facts of the present case, the imposition of a more burdensome dress code on female waitresses would clearly constitute an infringement of Section 4 (1) (g) of the Ontario Code.

The proper legal analysis of the present fact situation becomes more difficult, however, if it is assumed that the respondent was, in effect, establishing a new category of employment available to female applicants only. It is this construction of the fact situation which counsel for the respondent has argued to be the appropriate one. If this were so, it could be argued that since the position is available to females only, there is no factual basis for a finding that male and female employees occupying the same position are being

treated in a different fashion. The new position might be vulnerable to attack under the Human Rights Code if it were found that potential male employees were unfairly discriminated against, but the situation would clearly not be one in which members of both sexes occupy a position of employment and are subjected to different terms and conditions of employment. (In the face of a complaint by a potential male employee that he is unfairly excluded from recruitment for the position, it would be necessary for the employer to mount a defence on the basis of Section 4 (6) of the Code by establishing that being female is a "bona fide occupational qualification and requirement for the position or employment" or, to use the short form of reference, that sex is a "bfoq" for the job in question). Obviously, it would not be terribly difficult to draft a job description for the new job of "topless waitress" in such a way as to make membership in the female sex a genuine requirement for the job. In the present case, the respondent denies the creation of such a job category and hence has difficulty establishing a factual basis for a conclusion of this kind. Nonetheless, counsel for the respondent argues that if the complainant's version of the facts are accepted, it would be a reasonable inference to draw in all the circumstances that the respondent was attempting to establish a new category of employment available to females only which therefore could not be said to impose a discriminatory condition on female applicants.

Assuming, for the purpose of exploring alternate lines of analysis, that the respondent's suggestion be accepted, this line of argument would in my view prove too much. If it were open to an employer by virtue of establishing a separate job description

to immunize itself from allegations of discrimination, the provisions of the Code would be seriously undermined. Two implications of the respondent's argument are especially problematic. First, where in a particular employment context, the reality is that men and women do essentially the same work, it ought not to be possible to create a different job category by the very act of imposing discriminatory dress code. This would be to permit, as counsel for the Commission argued, employers such as the respondent to do indirectly what the Code would not permit them to do directly.

Secondly, if the proper interpretation of the Code is that contended for by the respondent, it would permit an employer to convert female occupants of some traditional work category, such as waiting tables, into entertainers of sorts. Again, it would be an unfortunate reading of the Code which would make it possible, by simply re-writing a job description, to convert female holders of such jobs as stenographers, receptionists, waitresses, tellers, airline stewardesses or gasoline station attendants, whose principal function is not that of providing entertainment, into entertainers simply by attaching an oppressive dress condition to a traditional category of work.

Both of these undesirable consequences would arise in the present case if the argument of the respondent were to succeed. First, it is accepted that both men and women were employed by the respondent tavern to perform the task of serving tables. It would

be improper under the Code to impose discriminatory dress conditions on female occupants of that position. It would be permitting the employer to do this indirectly if the argument that a new job had been created were to succeed. Secondly, by giving effect to this argument, female employees carrying out the normal job of waiting on tables would be converted into purveyors of a particular kind of entertainment.

The question for a Board of Inquiry established under the Code, of course, is not whether such results are simply undesirable but rather whether they are precluded by a proper interpretation of the Code. In this regard, it is of interest that a number of decisions, both American and Canadian, dealing with analagous provisions appear to support the view that the imposition of an oppressive dress condition would infringe the Code even if the "job" in the narrow sense appears to be performed principally or perhaps exclusively by females.

In E.E.O.C. v. Sage Realty Corporation, 507 F. Supp. 599 (U.S.D.C., 1981) the defendant corporation was held to have infringed an analagous provision of a Title VII of the U.S. Civil Rights Act by requiring its lobby attendants to wear specially-designed bicentennial outfits which were, in the case of the plaintiff at least, revealing in nature. The outfit was indeed of such nature that the plaintiff was, while wearing it in the course of her duties, subjected to repeated harrassment in the form of sexual propositions and lewd comments and gestures. The corporation argued that the requirement that lobby attendants wear the uniform was in exercise of their right to

prescribe employee attire. The Court reasoned as follows (at pp. 608-609):

> The Court does not question an employer's prerogative to impose reasonable grooming and dress requirements on its employees, even where different requirements are set for male and female employees, when those requirements have a negligible effect on employment opportunities and present no distinct employment disadvantages. The prerogative to impose reasonable grooming and dress requirements, however, as this Court ruled in denying the defendants' motion for summary judgment, does not mean that 'an employer has the unfettered discretion...to require its employees to wear any uniform the employer chooses, including uniforms which may be characterised as revealing and sexually provocative.' E.E.O.C. v. Sage Realty Corp., 87 F.R.D. 365, 371 (S.D.N.Y. 1980).

There was no suggestion in this case that there were in fact male lobby attendants who were treated differently. Rather, it appears that even though the job functions of security, safety, maintenance and information dissemination could presumably be performed by male employees, all of the defendant's lobby attendants were female and required to wear the new outfit. (See the discussion in Note 8 at pp. 603-604). Further, it appears that an argument made on behalf of the defendant to the effect that the new uniforms were an attempt at lighthearted, not to say patriotic, entertainment was unavailing. (See pp. 610-611, esp. n. 17). Although this point arose in the context of a discussion of first amendment rights, it is clear that the Court was unpersuaded that an "entertainment" rationale could lift the defendant outside the prohibition of Title VII.

A New Brunswick Board of Inquiry decision dealing with the work environment similar to the facts of the present case reaches similar conclusions. In Marianne E. Doherty and Cynthia A. Meehan v. Lodger's International Ltd. (1982), 3 C.H.R.R. para. 5654, the complainants were two waitresses who had been dismissed by the

defendant for refusal to wear a revealing outfit when carrying out their duties as cocktail waitresses. The job functions in the workplace were divided up in such a way as to restrict the function of waiting on tables to female employees, who were all required to wear the outfit in question. Male employees were hired to act as bartenders.

The Board of Inquiry concluded that the equivalent provision of the New Brunswick Code was infringed by this requirement in that it amounted, in effect, to a more burdensome work condition being imposed on female employees because of their gender. The Board reasoned as follows: (at para. 5709)

> I am supported in this conclusion by the following consideration. Males employed in Tiffanys in the performance of similar, but not identical, job functions were not required to wear any uniform and, more particularly, not any uniform which accentuated their male sexuality. The argument that the differentation in uniform requirements was based on job function cannot succeed because the division of labour was also primarily based upon gender. Mr. Kileel told Ms. Hammon-Demma, the Commission's Investigating Officer, that he had not hried and did not intend to hire, male waiters. That fact is not the subject matter of this Complaint but it is cogent evidence in support of my conclusions.

In this case, then, the employer's attempt to create a job held by females only which would involve the wearing of revealing apparel was held to infringe the Code inasmuch as males performing similar, albeit somewhat different, job functions were not subjected to similar treatment.

In my view, the Sage Realty and Lodger's International cases are suggestive of one line of interpretation of the Code's provisions which may be helpful in cases of this kind. In any case where, as in Lodger's essentially similar work is done by both male and female employees, the imposition of a more burdensome dress requirement on females would constitute an infringement of the Code. It would appear that the language of Section 4 (1) (g) is sufficiently broad to embrace a situation of this kind. Nothing in that section suggests that discrimination can only be found where both male and female employees occupy positions having the same job description in the narrow sense. If male and female employees are engaged in roughly similar work, the terms and conditions of their employment should in these respects also be similar. In the present case, it has been noted that at the very least there are male and female employees engaged in essentially similar work, and on this basis, therefore, I would hold that even on the view of the fact taken by counsel for the respondent, discrimination within Section 4 (1) (g) has occurred.

A second point of interpretation suggested by these cases is that where the job in question is in fact held only by female employees, an argument of the kind raised on behalf of the respondent should not succeed unless membership in the female sex is a bfoq for the job in question. Thus, in a case like Sage Realty where the employer is in fact hiring only female employees for the position in question, this ought not per se to constitute a defence to a claim of discriminatory treatment if in fact the job is one which should by law be made available to both male and female applicants.

The facts of Sage Realty itself, for example, appear to be a very difficult situation in which to defend membership in the female sex as a bfoq, and it is obvious that if male employees were hired to fill a position, they would not be required to wear the "bicentennial" outfit. If a basis for this assumption were established in evidence, it would be a perverse reading of the Code which would permit a defence to a complaint under Section 4 (1) (g) simply because there were no actual male occupants of the position in question with whom a direct comparison could be made.

With respect to a particular form of employment, of course, it may well be that an employer could establish that an "entertainment" dimension dominates and can be demonstrated to have a compelling commercial rationale. Thus, it seems obvious that the hiring of females only to perform a particular role in a theatrical production would be defensible. Indeed, although I of course make no finding on a question not before me, a strong argument could be made defending a poli of hiring females only for performances as exotic dancers. The Ontario Human Rights Code, I should emphasise, is not as I understand it a statute which regulates matters of public decency or precludes forms of entertainment which some members of the community at large may feel to be in poor taste. What is objectionable under the Code, in my view, is the subjection of female employees engaging in work essentially similar to that of male employees to become, in effect, entertainers by virtue of a requirement to wear immodest dress. Such practices discriminate against female employees with respect to a term or condition of their employment. Again, while it would be open to an employer to demonstrate that what I have referred to

as the entertainment factor in a particular job gives rise to a proper claim of bfoq which would permit an employer to hire females only and to impose unusual dress requirements, it is of interest that there is at least one American decision treating such claim with scepticism in a factual context not dissimilar to the facts of the present case. In Guardian Capital Corp. v. New York State Division of Human Rights 360 N.Y.S. 2d 937, a dismissed waiter successfully challenged, under New York human rights legislation of a similar nature, his dismissal as a waiter in a restaurant on the basis that the employer's decision to replace all male waiters with female waitresses for commercial reasons constituted unlawful discrimination. The employer attempted to raise a bfoq defence on the basis of its belief that waitresses attired in alluring costumes would be better able to enhance the volume of business of the restaurant in question. The Court, after reviewing evidence relating to sales volume, concluded that this belief was without any factual basis and therefore rejected the bfoq defence. In a dissenting opinion, Reynolds J. indicated concern that the New York Human Rights Division had itself ruled to the contrary in a case involving a similar complaint concerning the employment of so-called "bunnies" in a Playboy Club. Although the dividing line in such cases is no doubt a fine one, presumably the rationale for reaching a different conclusion in the latter case was that the division was persuaded on the basis of evidence submitted to it that the job in question had a provable and substantial commercial rationale, and that the "entertainment" aspect of the job was essential to it.

Although there does not appear to be direct Canadian authority rejecting a bfoq argument in this context, its invalidity appears to

have been assumed by Boardsof Inquiry in Lodger's International (supra) and in Kesterton v. Spinning Wheel Restaurant (B.C., Oct.22,'75)

In the present case, no groundwork has been laid for establishing a claim of this kind. On the contrary, the only evidence with respect to the commercial value of establishing a category of "topless waitresses" is that they would have no apparent impact on the respondent's business. Some experimentation with the employment of topless dancers who also waited on tables in 1979 did not enjoy significant success and was abandoned. I share the view of the New York court in Guardian Capital Court that a mere statement of the commercial desirability of a discriminatory job category would not itself establish a bfoq.

In summary, then, the legal framework within which the present problem must be considered is the following. In a case where male and female employees occupy the same position of employment and are subjected to disproportionately burdensome dress codes, a clear infringement of the Code is established. Secondly, in any case where although the job in question is held only by female employees, there are male employees doing essentially similar work who are not subjected to a similarly burdensome dress requirement, a contravention of the Code is also established. Thirdly, and perhaps more controversially, it appears to me that where a separate job category is set up for female employees only, an unusual dress code requirement would be defensible only if on an assessment of the essential characteristics of the job, it could be established that being a member of the female sex is a bfoq for the job in question. Otherwise, the employer would be able to lift itself outside the Code and deprive female employees of the protection of Section 4 (1) (g) by committing acts of discrimination against potential male employees.

VI

In applying these propositions to the facts of the present case, it is important to determine whether the present situation is one in which a discriminatory condition was attached to an existing job or whether a new job category for females only can be said to have been established.

It is my view that the respondent has not established a factual basis for the conclusion that a separate job category was established. The fact that both the occurrence of the incident in question and the existence of any intention to hire topless waitresses have been denied by the respondent's witnesses means, of course, that there was no direct evidence of intention with respect to this point. There is, however, some basis for concluding that no separate category was intended. First, it has been noted that the hiring of waiters and waitresses was governed, in the present case, by a collective agreement which set forth the job description for this position. Both male and female employees were employed in this position and at the contractual rate stipulated in the collective agreement. The agreement provides for the establishment of new positions through consultation with the Union, and no such consultations were undertaken with respect to the topless waitress position. Finally, as has been suggested previously, it is at least doubtful that a separate category of female waitresses would be defensible under the Human Rights Code, and I would be reluctant to assume, in the absence of clear evidence with respect to intent, that there was an intention to establish a category of employment which would appear to infringe the Code.

Alternatively, however, if the proper view is that it can be inferred that a separate job category was intended, it is my view that contravention of the Code is nonetheless established in the present case. First, it is at least clearly established in the record that male employees of the respondent tavern were engaged in doing the same work of serving tables and were not subjected to the burdensome dress code. Further, no basis has been established in the evidence before this Board of Inquiry for the conclusion that a separate category of female waitresses could be defended as a legitimate bfoq and, as I have suggested above, in the absence of a valid claim of bfoq, the mere existence of a separate category of employment ought not in itself to raise a defence to a complaint of discriminatory work conditions.

In order to uphold the burdensome dress code requirement, the respondent would have to establish that the basic function of the job of serving tables is one performed only by females, or that the basic function of the job is the provision of entertainment of a kind which can be provided only by females. Neither of these propositions has been established in the present case. Indeed, the evidence strongly suggests that the basic function of the job in question was serving tables, and that this is a job which in the very tavern in question was performed by both male and female employees.

Before leaving this question, it may be useful to emphasise that it is not my view that the Ontario Human Rights Code regulates questions of public decency or taste with respect to matters of dress. Thus, it is not in my view impossible to establish a category

of employment for which membership in the female sex is a bfoq and which might involve requirements with respect to dress or appearance which many members of the community might find offensive on moral or other grounds. What the Code does preclude, in my view, is the imposition of disproportionate burdens of this kind on women engaged in work which is essentially similar to that of their male colleagues.

It follows from this view that the mere fact that a particular manner of dress may amount to a contravention of our criminal law or some other area of federal or provincial law would not in itself establish a breach of the Human Rights Code. In the present case, counsel for the Commission placed some reliance on the existence of a by-law of the Municipality of Metropolitan Toronto (By-law No. 58-79, Feb. 13, 1979) regulating dress in "eating or drinking establishments" requiring the wearing of "clean opaque clothing fully covering...specified body areas" including, in the case of female serving persons, the breasts. It was argued that the existence of the by-law meant that imposition of a contrary dress code was, in essence, a per se offence under the Code. Again, it is my view that the Code does not regulate such matters. An employer cannot impose differential requirements which are unreasonable. It may well be that a dress requirement raising questions of good taste or, indeed, regulation under other statutes, might survive an attack under the Ontario Human Rights Code on the basis that both males and females are treated similarly or that it is imposed on members of one sex holding a job for which gender is a bfoq.

VII

Counsel for the respondent has argued that even if it be established that a discriminatory dress code has been imposed by the respondent, such conduct would not be caught by Section 4 of the Code with respect to individuals who have not yet become employees. Thus, it is argued, insofar as there is any prohibition in the Code dealing with terms and conditions of employment relating to dress, this would be covered only by Section 4 (1) (g) which refers in its terms to "employees". In the present situation, the complainant was not given the job and therefore never became an employee. Section 4 (1) (a), it is argued, is the appropriate section with respect to the present case, and it does not deal with the imposition of discriminatory terms and conditions of employment but rather prohibits refusal to recruit on grounds of race, creed, colour, age, sex, etc. On this view, one could not complain about a discriminatory work condition until one actually achieved the status of being an employee.

I do not find this interpretation of Section 4 persuasive. In my view, the imposition of a discriminatory work condition which has the effect of discouraging members of a target group from taking the job in question must be considered to be a constructive refusal to recruit members of the target group. There is no doubt in the present case that the complainant would, but for her refusal to comply with this work condition, have been a suitable candidate for employment. I draw some support for this conclusion from the

fact that similar reasoning appears to underlie the decision of Professor P.A. Cumming, sitting as an Ontario Board of Inquiry, in Singh v. Security and Investigation Services Limited (January 11, 1977).

If one were not to interpret the Code in this fashion, its provisions could be easily evaded by an employer who indicated that members of a particular target group would be treated less favourably than other employees and thereby discouraged all members of the group from taking employment. To discourage employment in this fashion would, in my view, be a refusal to recruit within the meaning of Section 4 (1) (a). So, too, in my view, would be the establishment of a discriminatory condition coupled with a refusal to consider candidates who will not comply with the condition and this, of course, appears to be the factual situation of the present case.

VIII

A further argument made on behalf of the respondent is that the Appointment establishing the present Board of Inquiry is a nullity inasmuch as it purports to launch an inquiry into the conduct of an entity, the Molly 'N Me Tavern, which is in fact not an incorporated body but rather a partnership of Mr. & Mrs. Nightingale carrying on business under that name.

The critical provision of the Code for the purposes of the present inquiry, Section 4, prohibits discriminatory conduct undertaker

by any "person". Section 19 (h) of the Code provides as follows:

> (h) "Person", in addition to the extended meaning given it by the Interpretation Act, includes an employment agency, an employers' organisation and a trade union.

Section 30 (28) of the Interpretation Act provides as follows:

> "Person" includes a corporation and the heirs, executives, administrators or other legal representatives of a person to whom the context can apply according to law.

Thus, it is argued, neither of these provisions includes unincorporated associations generally, or partnerships in particular.

Support for the view that failure to name a legal person in the requisite sense in the Appointment results in it being constituted a nullity as drawn from the decision of the Ontario Court of Appeal in Re Cummings and Ontario Minor Hockey Association (1979), 26 O.R. (2d) 7, in which it was held that the respondent Association, an unincorporated body, could not be the subject matter of a proceeding under the Code and that the proceeding pursuant to the Appointment had therefore been a nullity from its inception. Thus the respondent Association was capable of waiving the objection in order to obtain an authoritative disposition of the matter.

Although this Board of Inquiry is, of course, bound by the decision of the Ontario Court of Appeal in the Cummings case, there are two reasons, in my view, for distinguishing that authority as inapplicable in the present situation. In the first place, the complaint in the present case does in fact refer to and make allegations with respect to the conduct of a natural person, Mr. Albert Nightingale. Section 14 (b) (1) (d) provides that any person named in a complaint as alleged to have contravened the Act becomes a party to a proceeding.

The actual complaint, then, is a physical document in which an identified natural person is alleged to have contravened the Act. The Appointment establishing this Board of Inquiry instructs the Board to hear and decide a particular complaint, i.e. the actual complaint made by Ms. Susan Ballantyne. Thus, although it is true that the style of the Appointment refers only to the Molly 'N Me Tavern, the style indicates that the inquiry is to be conducted with respect to the actual complaint made by Ms. Ballantyne. When the complaint is read together with the Appointment, it is evident that the Board of Inquiry has been established to inquire into certain matters involving the conduct of a natural person. If the rationale of the Cummings decision is that a Board of Inquiry could not be established to inquire into the affairs of an entity which could not conceivably have committed an offence since it is not a "person", the present fact situation falls outside its reach. In the present case, the actual complaint which the Board of Inquiry is appointed to hear and decide makes allegations with respect to the conduct of a natural person whose conduct could, indeed, infringe the Code.

An alternate basis for rejecting the submission is that it is my view that a reference in an Appointment to a "person" in the requisite sense does occur when the Appointment refers to a trade name under which a "person" carries on business. Thus, in the present case, reference to the trade name under which the partnership carries on business should be taken to be a satisfactory reference to the partners themselves. This is not, like the Cummings case, a situation in which there is no "person" who might have contravened the Act, but rather a situation in which the persons have been

mis-described by reference to the name under which they carry on business.

A somewhat similar situation arose before the present Chairman sitting as a Board of Inquiry in the case of Rawala and Sousa v. De Vry Institute of Technology (R.S. 9th, 1982). In that case, the named respondent was in fact merely a division of a corporate entity having a different name. A similar objection to the proceedings, again relying on the Cummings decision, was taken. Dismissal of that objection was based in part on the basis that a reference to a trade name should, as is the case in civil proceedings, be taken to be a sufficient reference to the entity carrying on business under that name. The point was expressed in the following terms: (at pp.33-34)

> A second and distinct basis for dismissing this objection is that the naming of a respondent by its trade name constitutes, in my view, an adequate naming of the respondent for the purpose of instituting and conducting proceedings, provided that the use of the trade name is such as to clearly indicate to the corporate entity carrying on business under the trade name that it is the intended respondent in the proceedings. Use of the trade name to identify the respondent constitutes the use of a misnomer rather than reference to a non-existent entity. Thus, in civil proceedings, a plaintiff may bring action against a person, identifying that person by the name under which it carries on business and indeed, any order granted in the action may be enforced by execution against the property of the person so sued which is used or employed by the person in or in connection with the business in question. In Ontario, this rule is stated as Rule 110 of the Ontario Rules of Practice, R.R.O. 1980, Reg. 540, as amended. In the absence of any guidance on this point in the Ontario Human Rights Code, it would seem appropriate for a Board of Inquiry to conduct its proceedings in accord with this principle. Accordingly, it is my view that reference to a respondent by a trade name under which it carries on business is an adequate reference to a respondent for the purpose of proceedings

> under the Ontario Human Rights Code, and I would see this as merely one instance of the application of a more general principle that the erroneous use of a misnomer in an appointment or a complaint would not render proceedings initiated thereby a nullity.

There can be no doubt that Mr. Nightingale appreciated that he was the subject of the present complaint and a party to these proceedings. In the absence of any evidence of prejudice, it is evident that an objection of this kind when raised at the end of a proceeding will, if successful, result in a wasteful duplication of effort if the matter is ultimately to be considered on its merits. Accordingly, there is good reason, in my view, not to extend the holding of the Court of Appeal in Re Cummings beyond the circumstances of that case, i.e. where the named respondent is not a "person" in the requisite sense and is not even a trade name under which a "person" carries on business.

IX

The evidence concerning the complainant's previous work experience and the absence of any objection to her employment by Mr. Nightingale other than her refusal to comply with the dress condition, provides a basis for a conclusion that were it not for this refusal, Ms. Ballantyne would have been offered employment by the respondent. This being the case, the complainant is, in my view, entitled to compensation for the lost opportunity for employment for as long a period as would, with reasonable effort, have enabled her to seek employment elsewhere. On the facts of the present case, the latter point poses no difficulty inasmuch as the complainant continued to

seek employment immediately after her encounter with Mr. Nightingale and after a period of two weeks was hired by another tavern. The hourly rate obtaining at the material time for the position in question was $3.98 (transcript pp. 27 and 30). During the two-week period of unemployment, the complainant worked on a part-time basis for other taverns (Exhibits 26, 27 and 28). Deducting the amounts actually earned by the complainant during that period from what would have been earned through two weeks of employment with the respondent yields an amount of $222.00 as an appropriate level of compensation for lost employment opportunity.

It is further argued on behalf of the complainant and the Commission that substantial damages in the amount of $1,000 should be awarded to compensate the complainant for the psychological injury resulting from this incident. The complainant testified that she was quite distressed by the incident and felt humiliated and degraded by the conduct of Mr. Nightingale. There was, however, no evidence led to suggest that any long-term psychological injury was sustained or that the harm resulting from the episode was more than transitory in nature.

Boards of Inquiry across the country have, in recent years, adopted the practice of awarding compensation for injuries in the form of "hurt feelings" or "humiliation" or "injury to dignity". Developments in this respect from 1972 to 1982 are usefully summarised by Professor Tarnopolsky in his text, Discrimination and the Law in Canada (1982). As Professor Tarnopolsky indicates, there appears to have been a gradual escalation in the quantum of these

awards over that period of time. In the present case, however, it is not my view that a substantial award is appropriate in view of the absence of evidence of anything more than a short period of distress. Moreover, it might be said that the Union had itself contributed to the stressful nature of the situation for the complainant inasmuch as it had not advised the complainant of the original nature of the request made by Mr. Nightingale. Accordingly, modest compensation in the amount of $100.00 is in my view a more appropriate level of compensation for the injuries sustained.

X

ORDER

For the foregoing reasons, this Board of Inquiry makes the following orders:

1. It is ordered that Mr. Albert Nightingale pay the complainant Two Hundred and Twenty-Two Dollars ($222.00) as compensation for the loss of employment opportunity.

2. It is ordered that Mr. Albert Nightingale pay the complainant One Hundred Dollars ($100.00) as compensation for mental distress.

3. It is ordered that Mr. Albert Nightingale send forthwith a letter of assurance to The Ontario Human Rights Commission undertaking to comply with the Ontario Human Rights Code in the future.

DATED at Toronto this 6th day of December 1982.

John D. McCamus
Board of Inquiry